In The Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1606

CORTLANDT PARKER and
LA VERNE STAMPFLI,

Plaintiffs and
Appellees,

vs.

WENDELL H. RUSSELL, LORNA E. RUSSELL, RUSSELL'N PINES MOTEL, a partnership, and TAHOE TITLE GUARANTY COMPANY, a corporation,

Defendants and
Appellants.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellants, Wendell H. Russell, Lorna E. Russell, and Russell'n Pines Motel, a partnership, appeal from the judgment of the Supreme Court of the State of California, entered February 9, 1978, denying a Petition for Hearing from the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered on June 27, 1977, and as modified on October 25, 1977, and as modified on November 22, 1977. The effect of the opinion of the Court of Appeal of the State of California, First Appellate District, was to affirm the jury verdict in the trial court. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The Supreme Court of the State of California rendered no opinion and its orders are unreported. Its Order denying a Petition for Hearing is appended hereto as Appendix C.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is unreported. A copy of the modified opinion of October 25, 1977, is appended hereto as Appendix A, and a copy of the modified opinion of November 22, 1977, is appended hereto as Appendix B.

JURISDICTION

This appeal arises from an action on a real estate broker's note for his commission as secured by a trust deed on real property, with foreclosure and deficiency judgment, and the defenses of fraud, the broker's breach of the duty of good faith and fair dealing, and the broker's failure to complete his job as agreed.

The final order of the Supreme Court of California denying hearing was entered on February 9, 1978. A timely notice of appeal was filed on March 30, 1978, in the Court of Appeal of the State of California. First Appellate District.

The jurisdiction of this Court is invoked under the provisions of the "Due Process Clause" and the "Equal Protection Clause" of the *Fourteenth Amendment* of the Constitution of the United States.

Cases that sustain the jurisdiction of the Court include:

(a) A juror's affidavit may be received if it relates to extraneous influences brought to bear upon the jurors, and jurors may show by their testimony what the extraneous influence was, and whether it was of a nature calculated to be prejudicial. *McDonald* v. *Pless* (1915) 238 U.S. 264, 59 L.Ed. 1300, 35 S. Ct. 783.

(b) Arbitrary, unreasonable, capricious state action: *Cleveland* v.*Board of Education* v. *Le Fleur* (1974) 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed. 2d 52 (mandatory leave for pregnant teachers.)

QUESTIONS PRESENTED

1. **Juror Misconduct.** The Courts below denied appellants both "due process of law" and "equal protection of the law" in failing to grant a new trial after juror misconduct outside the Jury Room. At the end of the first afternoon of deliberations, the jury was deadlocked and requested a rereading of the instructions. The Court sent the jury home for the night. One of the jurors researched the dictionary definition of "promissory note," and reported her findings and interpretations to four or five other jurors outside the jury room the next morning before the jury reconvened. Within five minutes after reconvening, the jury, without a rereading of the instructions, returned a verdict in favor of plaintiffs. The California Courts have granted relief to the injured party in other cases involving juror misconduct.

2. **Arbitrary, Unreasonable, Capricious State Action.** The Court of Appeal of the State of California, First District, Division Four, in its Modified Opinion of October 25, 1977, as set forth in Appendix "A", p. A-4, ignored and refused to consider Appellants' presentation of facts as to the breach of the duty of good faith and loyalty owed to them by real estate broker Cortlandt Parker, on the grounds that Appellants had failed to set forth *all* the material evidence on the point. Approximately 90% of the evidence set forth by Appellants consisted of handwritten documents by Parker and Parker's own testimony, which was unchallenged, uncontraverted, unimpeached, and unrebutted, as set forth by Appellants in some 23 enumerated points. Appellants presented no opposition evidence on these points because there was none. Appellees presented none either — because there was none, although Appellees did present evidence of good faith on other points unrelated to the 23 points raised by Appellants. Bad faith is indivisible. It is not offset by good faith in some other area, just as loyal and faithful service by a bank teller for 30 years does not offset a single act of embezzlement. The Court of Appeal, in refusing to consider Appellants' presentation of evidence on real estate broker Parker's bad faith, acted in an arbitrary, unreasonable, and capricious fashion, unrelated to any legitimate state purpose.

The Conduct of the Court of Appeal is explainable by way of a basic defect in the administration of justice which imposes an intolerable burden upon all of the Appellate Courts and Court Staffs of this nation, to search the record, and correlate the record, whenever the sufficiency of the evidence is challenged, and Appellees do not directly respond to Appellants' briefs. Appellants present the solution to the problem as set forth below, under the "Statement of the Case," a solution which will further the efficient and just administration of justice.

STATEMENT OF THE CASE

Juror Misconduct

At 2:55 P.M., February 13, 1975, the jury retired to deliberate. (CT 189) At 5:55 P.M., a note was received from the jury reading as follows: (CT 288)

> "2-13-75 5:47 P.M. From Foreman Bruce Yamamoto. Request for outline of last deliverance from Judge Hayes (as to what pertinent instructions jury would deliver verdict whether to Def. or Plaint."

At 6:05 P.M. the court inquired of the jury and was advised they would prefer to have the rereading of the instructions in the morning. (CT 190) At 6:15 P.M., the Court advises the jury to return at 9:00 A.M. in the morning.

On the morning of February 14, 1975, the jury retired at 9:05 A.M. and at 9:15 A.M., the Court receives a notice that the Verdict has been reached. (CT 212) The verdict was *unanimous* for plaintiffs. (CT 212)

What happened in the meantime?

On motion for new trial, defendants Russell submitted the affidavit of juror Elise Butterfield (CT 268-269) in which she indicated:

> "The turning point of the deliberations was when one of the jurors looked up the definition of promissory note in the dictionary at home at night during recess of our deliberations and brought the definition back to the jurors the following morning. That was the deciding point. A promissory note is an unconditional promise to pay and there can be no defense to payment on that note."

After plaintiff's counsel had advised each juror by mail that the jurors were being accused of juror misconduct (CT 325-336), Mrs. Butterfield softened her statement. (CT 314)

However, juror Mary Garrison admitted in her post-trial deposition that she had researched the definition of "promissory note" at home at night and conveyed her interpretation to some of the other jurors, outside the jury room, prior to the beginning of deliberations on February 14, 1975. (See Deposition of Mary Garrison, 9-12; 13:20-27.) See also declaration of Elizabeth N. Boegel. (CT 324)

California *Evidence Code* Section 1150 (a) provides that juror affidavits are admissible as to "statements made, or conduct, conditions, or events occurring either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." However, no evidence is admissible to show the effect of such statement, conduct, or event upon a juror, nor of the mental processes involved.

The Supreme Court of California in *People* v. *Hutchinson* (1969) 71 Cal.2d 242, 78 Cal. Rptr. 196, 455 P.2d 132, in construing *Evidence Code* Section 1150(a) repudiated the former rule against impeachment of jury verdicts. The only improper influences that may be proved under Section 1150 to impeach a verdict are those open to sight, hearing, and the other senses and thus subject to corroboration. See Witkin, 4 *California Procedure 2nd*, "Trial," Section 302.

In *Clemens* v. *Regents of University of California* (1970) 8 Cal. App.3d 1, 87 Cal. Rptr. 108, the Hutchinson rule was applied retroactively in a civil case. And under California law, the presumption of prejudice arises from *any* juror misconduct. *People* v. *Honeycutt* (Nov. 8, 1977) 20 Cal.3d 150, 141 Cal. Rptr. 698, at 700, 570 P.2d 1050. See also *Nichols* v. *Seaboard Coastline Railway Co.* (1977) 341 So.2d 671. (In which a juror researched the law on his own, outside the purview of the Court, by researching encyclopedia definitions of legal terms, to clear up confusion concerning several legal words and phrases, constituted prejudice as a matter of law, requiring reversal.) The Court in *Nichols, supra,* stated:

> "Rather, it is the use of *any* source, beyond the court itself, for instructions on the law of the case that condemns such practice."

See generally 32 ALR.3d 1356, "Juror Misconduct — Testimony."

Around the nation, the Courts have held that various forms of juror misconduct warrant a new trial. See *Self* v. *General Motors Corp.* (1974) 42 Cal. App.3d 1, 116 Cal. Rptr. 575 (juror concealed state of mind that would prevent him from acting impartially;) *People* v.*Murphy* (1973) 35 Cal. App.3d 905, 111 Cal. Rptr. 295 (failure of juror to disclose prejudicial state of mind;) *People* v. *Adame* (1973) 36 Cal. App.3d 402, 111 Cal. Rptr. 462 (presence of alternate juror in jury room;) *People* v. *Martinez* (1968) 264 Cal. App.2d 906, 70 Cal. Rptr. 918 (there must be prejudice;) *Turner* v. *State of Louisiana* (1965) 397 U.S. 466, 85 S. Ct 546, 13 L.Ed.2d 424, (jury trial in criminal case implies that evidence against defendant shall come from the witness stand, subject to judicial protection of confrontation, in the presence of counsel;) *State* v. *Cuzick* (1974) 11 Wash. App. 539, 524 P.2d 457 (presence of a stranger during jury deliberations and prejudice is presumed;) *Farrell* v. *State* (1973) 517 P.2d 225 (Unauthorized communication to a juror during deliberations is presumed prejudicial;) *Mares* v. *State* (1971) 83 N.M. 225, 490 P.2d 667 (Any unauthorized contact with a juror is presumptively prejudicial to a criminal defendant;) *State* v. *Reynolds* (1970, Ariz.) 466 P.2d 405 (Where events occur that cast irrevocable cloud over fairness and impartiality of jury in criminal prosecution, it is far better to grant motion for mistrial and start over again;) *Muller* v. *State* (1969, Okla.) 456 P.2d 903 (Where jury misconduct in criminal case occurs after case is finally submitted to jury, prejudice is presumed;) *Barnhart* v. *International Harvester Co.* (1968, Okla.) 441 P.2d 1000 (Any misconduct which might influence jury is sufficient to require setting aside of that verdict as a matter of safety.) *State* v. *Hawkins* (1967) 72 Wash 2d 565, 434 P.2d 584 (taking of evidence outside the court by a juror constitutes misconduct depriving defendant of a fair trial in that it violates defendant's right to confront the witnesses against him and to cross-examine them; and where misconduct is admitted, a juror cannot be heard to deny its prejudicial effect;) *Goff* v. *Kinzle* (1966) 148 Mont. 61, 417 P.2d 105 (It is misconduct warranting a new trial for a juror to assume the role of inspector or investigator; if misconduct of juror is established by competent proof and is prejudicial, new trial is warranted; improper conduct on part of juror is chargeable to entire panel; juror who investigated scene of accident and told jurors of experiments he conducted at scene was guilty of misconduct;) *Schmoyer* v. *Bourdeau* (1966) 148 Mont. 340, 420 P.2d 316 (litigants have a right to a fair and impartial trial, free from misconduct of the jury in material matters.;) *Skeet* v. *Wilson* (1966) 76 N.M. 697, 417 P.2d 889 (It is gross misconduct on the part of a juror to violate court's instructions and visit scene of accident;) *Bainton* v. *Board of Education of City of New York* (1968) 57 Misc.2d 140, 292 NYS.2d 229 (Where two jurors made separate and unauthorized visits to scene of accident, such conduct was so inherently prejudicial as to require new trial;) *Kalianov* v. *Darland* (1977, Iowa) 252 N.W.2d 732 (Litigant is entitled to have his case determined solely upon evidence presented in open court; this does not include right of jurors to consider evidence gathered by them outside the courtroom; nor is it essential that this proscription be limited to evidence gathered through jury misconduct since the threat to litigant's right to a fair trail is the same whether out-of-court evidence is obtained through misconduct or by inadvertence.)

Many of the foregoing cases have indicated a special preference for a new trial in the event of juror misconduct in a criminal case. Yet, under the Equal Protection Clause of the Fourteenth Amendment, all citizens are entitled to the same standard of juror conduct. Law-abiding civil litigants are entitled to the same standard of juror conduct as criminal litigants.

Litigants — civil or criminal — are legally entitled to a fair trial before a jury sworn to consider only the evidence — and only the law — presented to it in Court. It is the Court, and the Court alone, which is charged with the primary burden of assuring the litigants that their right to a fair trial is not an il-

lusory concept but a legal reality.

The integrity and effectiveness of the jury is at stake where there is juror misconduct. Consequently, the Court should interrogate the jurors to determine whether such misconduct actually occurred, and, if so, whether the litigants were prejudiced thereby.

In the present case, the juror misconduct is clear and present. And its prejudicial effect is evidenced by the alacrity with which the deadlocked jury returned a verdict against defendants after that misconduct.

As this Court stated in *Sherman* v. *United States* (1958) 356 U.S. 369 at 382, 78 S. Ct. 819, at 825, 2 L.Ed.2d 848,

> "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

Most of us have come to love the federal system because of the diversity which it provides — a diversity provided through the states as laboratories of political experience. But that love of diversity and political experimentation must come to a halt when it adversely affects the right of individual citizens who happen to be litigants, in either a criminal or civil action. To maintain our system and to maintain respect for the judicial branch of government, it is essential that we not tolerate jury verdicts tainted by prejudicial juror misconduct. A right to a fair trial, untainted by juror misconduct, is equally important to all the citizens of this nation as "one man, one vote."

The issue of juror misconduct, and violation of the Federal Constitution, has been raised at each and every level, beginning with the Motion for New Trial, in the trial Court, after discovery of the juror misconduct.

Arbitrary, Capricious, and Unreasonable State Action

Wendell and Lorna Russell built the Russell'N Pines Tower Lodge Motel (RT 16:18-20), and were owners of the motel from 1956 until they sold in 1968. For reasons of poor

health, the Russells decided, on medical advice, to sell their hotel in the Fall of 1967. (RT 21:15-22:6) Lorna Russell had lost the sight of one eye. (RT 667:4-6) She was 69 at the time of trial. (RT 665:5-6) Wendell Russell discovered in the Fall of 1967 that he was suffering from a brain tumor (RT 667:7-19), and he underwent brain surgery for the removal of that tumor on December 11, 1967. (Ex Q, CT 534) Thereafter, he had a long, slow convalescence (RT 693:13-25), and had considerable difficulty in reading, focusing his attention, paying attention to details, and maintaining any span of attention. (RT 119:8-23; RT 119:28-120:9) He suffered headaches upon any lengthy reading. (RT 417:1-5)

Plaintiff Cortlandt Parker was informed and knew of the ill health of the Russells. (RT 667:4-6: RT 667:28-668: 4; Ex Q, at CT 534; RT 367:1-6; RT 376:6-25; RT 276:12-18.) He was even advised of Mr. Russell's condition on the day of surgery. (Ex Q, at CT 534.)

The principal defense at trial was that real estate broker Cortlandt Parker had breached his duty of utmost good faith, loyalty and acting in the best interests of the Russells. This issue was presented to the Court of Appeal, First District, in detail in the opening brief. However, the Court of Appeal refused to consider defendants' arguments as to the insufficiency of the evidence on the ground that defendants had failed to submit *all* material evidence, although the Court itself did not specify a single item of material evidence omitted by defendants.

Defendants' arguments on the good faith issue were unrebutted, unchallenged, uncontraverted, and unimpeached. Defendants based approximately 90% of their argument upon the handwritten documents of Cortlandt Parker and Parker's own testimony at trial. The argument was set forth in 23 enumerated points, which are briefly summarized as follows:

1. **Sales Listing.** Parker used "sales listings" with the Russells in October, 1967 (Ex. 2) and April, 1968 (Ex. 3). Yet,

he was already a specialist in real estate exchanges, as opposed to sales. (RT 523) From the beginning, Parker knew the Russells requirements and objectives, of their need and requirement for $200,000 cash down, to pay capital gains taxes on sale of the motel and Parker's commission. (RT 276:27-277:2; RT 346:15-16; RT 483:1-4; RT 376:25-368:15) Parker testified that there was no way to describe in the listing form any other property coming in for the down payment. (RT 281:5-9) But Exhibits 2 and 3 show ample room to set forth Parker's real intention, simply by adding "or other property" to make the listing read "$200,000 down in cash or other property and the balance in a note."

2. **The Russells' Personality.** Parker knew the Russells were cautious, afraid, and unsophisticated, and said so in his memos to other brokers. (Ex. R & S, at CT 535 and 536.) He knew they were unsuitable candidates for wheeling and dealing in real estate. (RT 380) Yet, every proposal Parker put to the Russells and urged them to accept involved sophisticated real estate concepts. See Ex. A (CT 498-501;) Ex. C (CT 502-505;) Ex. AA (CT 539-543;) Ex. BB (CT 545;) Ex. CC (CT 546-549;) Ex. VV (CT 574-575;) Ex. XX (CT 577;) Ex. YY (CT 578;) Ex. ZZ (CT 579.)

3. **Urging Proposal Disapproved by CPA.** On December 11, 1967, Parker knew that CPA Rhodes objected to the Fairfield unfinished apartment complex. (Ex. Q, CT 534.) Yet, knowing this, and knowing the Russells were in ill health, Parker persisted in pushing the Fairfield unfinished apartment complex. (Ex. CC, at CT 548, item No. 4)

4. **Parker's Use of Assessor's Values.** On March 6, 1968, Parker went to great lengths to explain the assessor's assessed valuation and multiplying by 4 to get the assessor's appraised value, as a means of comparing the Russell motel with the Fremont properties to promote the exchange. (Ex. ZZ, at CT 539-543; RT 399:7-402:14) But when Mr. Russell raised the question of the low assessed value on the 160 acres in the "Schauer Exchange" which gave rise to this action, Parker had

"to reason" with Mr. Russell that if the Assessor assessed at full value, the taxes would go up substantially. (RT 293:20-294:13) There was no evidence that Parker ever re-evaluated the 160 acres in light of the low assessor's appraisal, which indicated an appraised market value of approximately $10,000, as opposed to the $200,000 value placed upon it. Rather, Parker merely sloughed off Mr. Russell's inquiry.

When Parker noted that the assessed value had dropped between the date of the M.A.I. appraisal in August 1967, and the date of the sale in August, 1968, he was gratified that taxes would be low. (RB 13; RT 451:11-18.) This represented a drop in the assessor's valuation from $2,810 down to $600 on property allegedly worth $200,000 under Elliott Ball's M.A.I. appraisal, and it placed Parker on notice to investigate. Parker's answer that appraised value is never used to determine fair market value is inappropriate. The issue is notice of low and declining value rather than a precise determination of market value.

5. **Russell's Rejection of Increased Indebtedness.** Parker knew the Russells did not want any increased indebtedness. (RT 350; RT 503) Yet, he repeatedly pushed the idea of refinancing either the motel or one of the properties he was urging the Russells to take in Exchange. (RT 285, 286, 287, 277, 308, 336-7, 348, 350, 484, 485, 486, 487.)

6. **Parker Blames The Attorney.** Parker blamed much of the unfinished business on the attorney. (RT 519, 373, 365) Yet, Parker never talked with Russell's attorney, and never asked to. He never suggested that the Russells talk to their attorney. He first met John Saldine on September 3, 1968, after the transaction was well in progress. (RT 365) It was Parker who handled the details of the transaction. Parker knew the name of Attorney John Saldine since October 25, 1967. (Ex. P, at CT 533)

7. **Parker's Dealings with Russells' C.P.A. John Rhodes.** Parker was advised by Rhodes from the beginning that raw land would be the equivalent of cash for tax purposes. (RT

118) Parker knew Rhodes had rejected all prior offers because of lack of cash. (RT 108) Yet, there was no evidence that Parker suggested that the Russells themselves talk with Rhodes before accepting the Schauer proposal.

8. **Parker Avoids Rhodes on Schauer Exchange.** Parker had been in repeated contact with Rhodes on various proposals to determine whether or not they would work. (RT 111) In the Reply Brief at 24, Parker argued that he was "always at great pains" to inform Rhodes of pending offers and to seek his advice. And it is true that Parker did inform Rhodes of pending offers — *except* on the Schauer proposal and Exchange. (Ex. 4) Parker never contacted Rhodes about the Schauer proposal until it was a fait accompli. (RT 111; RT 113; RT 340:15-19)

9. **Parker's Counter Offers.** Parker repeatedly made counter offers on prior and subsequent proposal. (See, e.g., CT 504, bottom; Ex. VV; Ex. OO) There was no evidence, however, of any counter offer on the Schauer proposal. Yet, Parker was negotiating for the Russells.

10. **Paying Other Brokers' Commissions.** Parker apparently never discussed with the Russells that if they refinanced the motel under the exchange agreement, they would have had to pay $20,000.00 out of the proceeds to Schauer's brokers for their fees and commissions. (See Ex. 4, at CT 468; RT 341-342; 344; Ex. L, at CT 524, at 526, Parker's escrow instructions.) There was no provision for raising the price of the motel by that amount. Thus, Parker sought to set up refinancing of the motel so as to make the Russells a party liable to the lender for the payment of the other brokers' $20,000 commission. (RT 342:15-20)

11. **Parker's Commission.** Parker wrote in ($42,000 In Kind" in his own handwriting as his commission on the Exchange Agreement. (Ex. 4, at CT 468) But Parker did not intend to take a portion of the 160 acres of bare land; he wanted other properties of the Russells as his "In Kind," preferably some of their Lake Tahoe property. (RT 288, 463-464) There

was no evidence he conveyed this intention to the Russells. If he were stuck with an interest in the 160 acres, he intended to take more than his commission called for. (RT 288)

12. **Parker's Provisions For His Commission.** When Parker prepared his escrow instructions (Ex. L) for the title company, he left off the "In Kind" in describing his commission. (CT 526) When he made his notations on the Mitchell Hunt proposal (Ex. M) he noted at the bottom, "Subj. to $42,000 cash." He made no notation for the Russell's cash needs, only his own. After his discussions with Saldine, Parker made his "Carl Greer Inn" notes (Ex. N) again noting his objective of $42,000 cash, but no note on the Russells' cash needs.

13. **Parker And The M.A.I. Appraisal.** Parker saw the Ball Appraisal (Ex. 8, at CT 471) with the assessed value of $2,810 for the full 200 acres. (CT 475) The appraisal was dated August 7, 1967. Then, Parker saw the First American Title Company's preliminary title report on the 160 acres (Ex JJ, at CT 553) and noted that the assessed value had dropped to $600. (See full discussion and testimony by Parker, RT 431:22-451:18, especially RT 451.) Parker made no attempt to investigate the reason for the sudden drop in the assessed value.

14. **Parker And The Quality Of The M.A.I. Appraisal.** Parker knew the Ball Appraisal was already one year old when he got it. (RT 284:17-285:6) He read it. (RT 297:20-22; RT 433:10-434:18) He read the comparables. Yet, sale No. 8's legal description describes 330 acres, not 38.64. He saw the land. There were no crops growing. (CT 478; RT 583:26-584:3) But his suspicions were not aroused. He knew that zoning, economic, and social conditions can change rapidly and affect the value of real estate. (RT 549:17-550:28) But he made no personal investigation to determine whether the appraisal was still accurate. Rather, he relied upon opposing brokers for that information. (RT 549:17-551:3)

In addition, Parker testified that he knew that raw land was difficult to sell and that it was difficult to obtain cash for

it. (RT 329-330) Since Parker knew land is not customarily sold for cash, how could he then also rely upon Ball's M.A.I. Appraisal which gave an appraised value of the 160 acres as *$200,000 cash*??? (See CT 472; RT 615:27-616:4; 625:2-7.)

15. **Parker Objects To Rhodes Inquiries.** As soon as C.P.A. John Rhodes began inquiring about the transaction, Parker wrote Unruh, the other broker, that Rhodes was "stirring the pot," but not to worry because he (Parker) still had control. (Ex. HH)

16. **The Cattle Lease.** Parker knew of the alleged cattle lease on the 160 acres, but did not include it in his escrow instructions to the title company. (Ex. L and SS; see RT 461:4-463:5; 463:25-28) Parker did not make contact concerning the lease until after escrow closed (RT 462:3-8,) and could not answer why it was not included. (RT 462:12-25.) He never tied the lease down and felt the Russells were unable to do anything about it. (RT 489:9-490:10)

17. **Road Easement.** Parker knew there was a need for an easement to the road over the adjoining property for access to the 160 acres, but did not include it in his escrow instructions to the title company. (See Ex. 1; RT 519:43-521:18)

18. **Separate Agreement on Parker's Commission.** Parker denied ever knowing about a separate agreement on the payment of his $42,000 commission note after the meeting in attorney John Saldine's office. Yet, the Commission Letter Draft, in Parker's own handwriting, found in the files of Tahoe Title Guaranty Company, shows that he knew the method of payment was to be stated in a contract at a later date. (See Ex. U; at CT 537, 538; RT 385:16-386:2; RT 426:1-427; RT 431) The handwritten material read:

> "$42,000 ~~CASH~~ note secured by TD on acreage ~~method~~ with acceleration clause method of payment to be stated in contract at later date."

What did Parker do? Take advantage of attorney John Saldine's heart attack?

19. **Exchange Listing On The 160 Acres.** On September 10, 1968, Parker prepared an Exchange Listing for the 160 acres and had the Russells sign it. (Ex. F) It reflected the commission as 10% of the selling price, with no commission for Parker if the sale or exchange is under $200,000. The listing implied that the Russells would receive $200,000. Parker knew of their cash needs. Yet, thereafter, Parker sought to push one cashless exchange after another (Ex. A, F, M, VV, XX, for example) on the Russells knowing fully that their obligation to pay him $42,000 cash would arise if they accepted any one of them.

Interestingly enough, Parker contemplated a commission pooling arrangement with other brokers, so that he would receive a commission regardless of the listing in Ex. F. (RT 313:16-24; RT 316:3-17; RT 486:2-23; RT 469:17-471:15; RT 546:16-547:20; RT 547:17-20; CT 514)

20. **Parker's Representation The 160 Acres Would Sell Quickly.** Despite Parker's testimony to the contrary at trial, Parker told the Russells he could sell the 160 acres quickly, and for cash. (Russell Testimony: RT 75:1-76:7; RT 98:10-16; RT 260:4-16; RT 684:25-28; RT 697:1-23; RT 698:6-17) Parker testified that he made no such representation. (RT 329:15-25; but see Ex. G, at CT 514, bottom; see also Ex. GG, right, at CT 550 on disposal of acreage.)

In his own handwriting, Parker stated to Unruh on August 8, 1968 (Ex. GG, CT 550) that he was off to the Berkeley meeting August 15, 16, 17, to dispose of the acreage.

Attorney Glade's notes of his September 6, 1968, meeting with Parker reflect the original idea was to dispose of the property quickly. (See Ex. H, at CT 521)

Parker repeatedly and matter-of-factly informed Rhodes he would sell the acreage and have the cash for taxes before the end of 1968. (RT 118:25-28; RT 119:1-7)

Even as late as June 15, 1969, Parker told Glade that he could sell the property. (Ex. E, Glade's notes.)

Finally, on March 1, 1970 (Ex. I, at CT 514,) Parker, in his own handwriting, implicitly acknowledged his earlier statements about selling the property for cash when he wrote:

> "Making a deal for the Russells under any conditions other than selling for $185,000 cash net to them is fairly remote *in spite of past conversation to the contrary* and even then negotiation would take place over the R.E. Fee to adjust it downward." (Emphasis added)

21. **Parker's Proposal of Usury to Russells.** When Parker proposed the Orangeville Plaza and Rio Vista Shopping Centers to the Russells in exchange for the 160 acres, he did not tell them about the $16,000 per year out-of-pocket loss. (Ex. VV, at CT 574-575) This proposal originated in Parker's mind. (RT 493:4-27) Parker suggested to the opposing broker that they sweeten the deal so the Russells would take on the problems. He even suggested payment of 16% interest to the Russells, which could have led them into a treble damage usury suit.

22. **Parker's Tahiti Proposal.** In January, 1970, Parker conceived and submitted to the Russells his Tahiti proposal (Ex. A and ZZ, at CT 498 and 580, respectively) which involved arbitrarily raising the value of the 160 acres from $200,000 to $300,000, discount the sales for free trips to Tahiti for the buyers paid for by the Russells, obtain trust deeds on the unimproved 160 acres, and market them at a discount. The Russells would have ended up with a net out-of-pocket loss in the first year. Parker further anticipated that if he induced the Russells to accept the idea for a 40 acre portion of the 160 acres, that the entire commission on the $42,000 note would then become due and payable. (RT 515:16-518:11) Only Parker would have received cash the first year.

23. **Parker's Final Commission Position.** Finally, on March 7, 1970, in a letter to J. Richard Glade (Ex. I, CT 511-516,) in describing the Russell's negative attitude to the Tahiti proposal (CT 512,) Parker indicated they would have to pay off the second trust deed to him prior to receiving any cash "(a condition which exists anyway)" and that they will have to pay a second real

estate fee on sale of the land prior to receiving any cash "(again a condition which must prevail.)" Then (at CT 514) he notes that because of his rising interest on the $42,000 note, it is no longer worth very much to him to try to sell the acreage. Even worse, he notes that if he obtained a cash sale for $185,000, the Russells would want to negotiate the real estate fee downward. But, that is exactly what the listing provided — no fee at all for Parker if the price were less than $200,000. (Ex. F)

The evidence supporting the above 23 points on Parker's bad faith to his principals, the Russells stands unimpeached, uncontraverted, unrebutted, and unchallenged. Approximately 90% of the exhibits cited are in Parker's own handwriting, and he never explained them away. Approximately 90% of the testimony cited is Parker's own testimony. There was simply no conflict in the evidence on these points.

While it is true that Parker did present evidence of good faith on other aspects of the transaction, such as how hard he worked and how many proposals he presented, good faith in one area of the relationship does not offset or cancel out bad faith in other areas.

The Court of Appeal of the State of California, First Appellate District, in its opinion as set forth in Appendix "A", ignored and refused to consider appellants' presentation of the undisputed evidence on the above 23 points on the ground that appellants' had failed to cite all the material evidence on the point. The problem was that there was no conflicting evidence on the point. The problem was that there was no conflicting evidence on these 23 points. Not even the appellees have been able to cite in their briefs below any conflicting evidence on the 23 points, material or not.

Appellants contend that the refusal of the Court of Appeal to consider the uncontradicted evidence as set forth in the 23 points constituted arbitrary, capricious, and unreasonable state action.

Solution To The Problem

The action by the Court of Appeal arose out of a simple defect in appellate practice. Appellants presented their case in 23 enumerated points. However, Appellees were not required to respond on a point-by-point basis. Thus, an impossible burden was shifted to the Court and Court Staff to search at Appellees' brief on the issue of bad faith. This is too great a burden to impose upon the Court system whenever the sufficiency of evidence is challenged on appeal. By requiring appellees or respondents, as the case may be, to present the conflicting evidence head-on, enumerated point by enumerated point, the task of the Appellate Courts is then made simple. First, check the accuracy of the citations to the record, and second, see whether there is, in fact, a conflict. The Court can then compare the factual statements side by side.

Absent such a system of checking the factual record when the sufficiency of the evidence is challenged, there is a considerable risk, as occurred in this case, that the Court may be misled by an apparent but non-existent conflict in the evidence.

REASONS FOR GRANTING CERTIORARI

Litigants throughout this land are entitled to a fair trial by jury, untainted by juror misconduct. The integrity and effectiveness of the jury system is at stake where there is juror misconduct. Such a fair trial is on the same level of basic rights as "one man, one vote," or non-discrimination in the selection of a jury or jury panel. Just as this Court has held in *Taylor* v. *Louisiana* (1975) 419 U.S. 522, 95 S. Ct 692, 42 L.Ed.2d 690, that the fundamental right to a jury trial is violated by the systematic exclusion of women from the jury panel, so a right to a fair trial untainted by juror misconduct is a fundamental right. Of what value is it to have proper rules for jury selection, if that selection in turn can be upset by juror misconduct.

The right to a fair jury trial is so fundamental that it should not depend upon whether the action is civil or criminal,

nor upon the jurisdiction in which the action is tried. All citizens are entitled to equal protection of the law as applied to a fair jury trial.

Likewise, where there is a challenge to the sufficiency of the evidence on appeal, an appellant's presentation of unchallenged, uncontraverted, unimpeached, and unrebutted evidence should not be summarily ignored simply because there is no conflicting evidence on the specific points raised. With crowded appellate schedules and increasing appellate burdens each year, the risk of a repeat of the events in this action are growing. The policy supporting the efficient and effective administration of justice calls for new guidelines in the preparation of briefs challenging the sufficiency of evidence as set forth above in order to lighten the burden of the Courts and Court Staffs across this nation and to simplify their tasks in handling such appeals.

SUMMARY

Appellants were denied due process of law and equal protection of the law when they were denied a new trial below on the grounds of juror misconduct. That misconduct occurred when the jury was deadlocked, requested a rereading of the instructions, and was sent home for the night. One juror then researched the definition of "promissory note" in the dictionary and conveyed her findings and interpretations to several other jurors outside the jury room before the jury reconvened the following morning. The impact was immediate. Without a rereading of the instructions, the jury was no longer deadlocked and returned a verdict for plaintiffs.

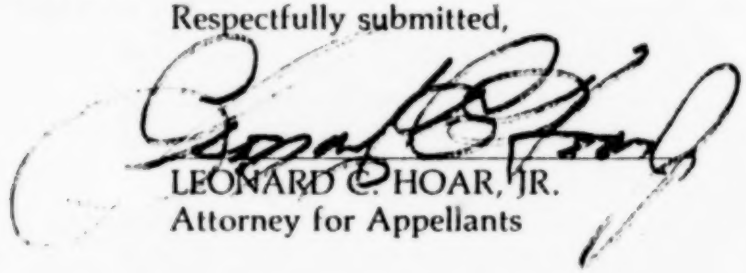
Appellants were further denied due process of law and equal protection of the law when the Court of Appeal of the State of California ignored and refused to consider appellants presentation of evidence on the issue of Parker's bad faith. The evidence was based primarily upon Parker's own handwritten

documents and testimony. It was unrebutted, unimpeached, unchallenged, and uncontraverted. Parker's testimony as to his good faith on other matters was irrelevant, for acts of good faith in one area of the relationship do not offset or cancel acts of bad faith in other areas.

For these reasons, appellants submit that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated: May 9, 1978

Respectfully submitted,



LEONARD C. HOAR, JR.
Attorney for Appellants

APPENDIX "A"

MODIFIED OPINION OF OCTOBER 25, 1977

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FOUR

CORTLANDT PARKER and LA VERNE STAMPFLI,
Plaintiffs, Respondents and Appellants,

vs.

WENDELL H. RUSSELL and LORNA E. RUSSELL,
Defendants, Appellants and Respondents.

1 Civil 38548
(Sup. Ct. No. 442108)

COURT OF APPEAL
FIRST APP. DIST.
FILED
OCT. 25, 1977
CLIFFORD C. PORTER, Clerk

By _____
Deputy

The appeal taken by defendants, and the cross-appeal by plaintiffs, are from a single judgment entered after proceedings which had been bifurcated for trial.[1] The complicated record requires this summary of some of the essential facts and procedural events:

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[1] We vacated our original disposition, of the two appeals, by granting one of the petitions for rehearing which were filed by both sides. We mention the fact because we have occasion to refer to the petitions in this opinion.

At all pertinent times, plaintiff Cortlandt Parker was a licensed real estate broker. In and before 1968, defendants owned and operated a motel in Placer County. On April 26, 1968, they gave Parker a written real estate listing which authorized him to negotiate a sale of the motel for $700,000 upon specified terms which included a cash down payment of $200,000. The listing provided that defendants would pay Parker a 6% commission, which it specified as "$42,000 cash if price of listing is acquired [*sic*]."

In August, 1968, as the result of Parker's efforts, defendants sold the motel to Herbert F. Schauer for $700,000. The terms of this transaction were spelled out in a written "Exchange Agreement," between defendants and Schauer, in which they agreed to accept from him (as a $200,000 down payment but in lieu of cash) the title to 160 acres of land located in Alameda County. The transaction was executed pursuant to the agreement.

On September 6, 1968, defendants executed and delivered to Parker their five-year promissory note for $42,000 (the so-called "Russell note") and, to secure its payment, a deed of trust (the "Russell trust deed") on the Alameda County land they had acquired from Schauer in the exchange transaction. The Russell note provided that Parker would be entitled to receive 8% interest on the $42,000 if he did *not* receive a commission from the sale of the Alameda County land, and to attorneys' fees if he instituted an action on the note.

On June 17, 1969, Parker executed and delivered to defendants his promissory note (the "Parker note"), pursuant to which they loaned him $15,000. On the same date, he gave defendants an assignment of the Russell note and trust deed.

The Alameda County land was not sold, nor was the Russell note paid within its five-year term. Parker therupon commenced the present action.[2] In the first of two causes of

[2] It is apparently undisputed that LaVerne Stampfli joined Parker as a plaintiff (and appears with him as a respondent and cross-appellant in this court) as the holder of an interest in the Russell note and trust deed under

action stated in his complaint, he sought to recover principal, interest, and attorneys' fees allegedly due him upon the Russell note; judicial foreclosure and sale of the Alameda County land pursuant to the Russell trust deed; and a deficiency judgment if the occasion for one arose.[3] In the second cause of action, Parker sought a declaratory judgment resolving an "actual controversy" as to whether his assignment of the Russell note and deed of trust had been "absolute" or whether he had made it only "as security for performance of the Parker note."

Answering Parker's second cause of action, defendants admitted "a controversy with respect to the Parker note . . . and that declaratory relief is a necessary and proper remedy." As to his first cause of action, their answer included material admissions and denials, miscellaneous defensive allegations, and an array of separately stated affirmative defenses. They also incorporated in it the full text of the 17-count complaint in an action they had commenced against Parker and others, involving the various facts recited above, in the Placer County Superior Court. We may sum up the thus-complicated format of the answer by stating that it pleaded against Parker the defenses of his fraud, negligence, breach of his contractural obligations to defendants under the real estate listing they had given him, and breach of his duties to them as their agent.

The legal issues issues joined by these defenses were tried by jury; the trial court reserved the remaining issues for its own determination.[4] After a ten-day jury trial, a verdict was

assignment from Parker, and for no other reason. Stampfli is accordingly included in our references to Parker or to "plaintiffs," but is not further mentioned by name.

[3] It may be mentioned here that a judicial foreclosure and sale of the Alameda County land, and a deficiency judgment, are mentioned in the prayer of Parker's complaint only; its charging allegations do not refer to either.

[4] When and how this bifurcation occurred may not readily be determined from the record, and the parties' briefs are not at all informative on the subject. The bifurcation is summarized in the final judgment (from which the appeal and cross-appeal have been taken) as follows:

returned in favor of Parker and against defendants. Judgment on the verdict having been entered, defendants moved for a new trial and for judgment notwithstanding the verdict. Both motions were denied.

After further proceedings, the trial court decided the remaining issues (see fn. 4, *ante*) in formal findings of fact and conclusions of law upon which the final judgment was entered. This judgment awarded Parker the amounts fixed by the court as principal and interest under the Russell note as offset by the Parker note (see *ibid.*), and as attorneys' fees. It also superseded—but effectively incorporated—the judgment previously entered on the jury's verdict as to the legal issues tried, ordered a judicial foreclosure and sale of the Alameda County land, and permitted Parker to recover a deficiency judgment upon his "application" thereafter. The appeal and cross-appeal followed.

Defendants' Appeal

Although defendants have appealed from the entire judgment, their arguments are addressed exclusively to the evidence and other matters presented at the jury trial and immediately afterward. We dispose of their various contentions as next indicated.

Sufficiency Of The Evidence

Defendants contend that, once they had questioned Parker's conduct as their agent, he bore the burden of proving that he acted in good faith toward them; and that he failed to sustain this burden. Although the argument is cast in terms of Parker's burden of proof (see *Batson* v. *Strehlow* [1968] 68 Cal. 2d 662, 675), it amounts to a challenge of the sufficiency

---

"This action came on for [jury] trial . . . to try the issues of money claimed under a promissory note and the defenses raised by the defendants to payment . . . The court previously reserved from the jury the calculation of the precise amount due to plaintiff on the stipulation of . . . [the parties] . . . that the calculation was a matter for judicial notice by the court and the offsets due to the defendants on the . . . [Parker note] . . . were matters to be heard by the court in the claims on [*sic*] declaratory relief, which require the court to sit without a jury."

of the evidence to support the jury's implied finding that he *did* exercise the good faith which was required of him as defendants' agent. Defendants mount the challenge upon a detailed recital of evidence which appears to favor it.

". . . [I]f, as defendants here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' (Italics added.) (Citations.)" (*Foreman & Clark Corp.* v. *Fallon* [1971] 3 Cal.3d 875, 881.) Defendants' unilateral recitals from the evidence have wholly failed to do this. It will otherwise suffice to state that, while the evidence is conflicting and would have supported opposing inferences, we find in it substantial evidence to support the jury's finding of good faith on Parker's part. We need not set it out from the 750-page reporter's transcript or the voluminous exhibits; much of it is cited in the plaintiffs' brief. Since it exists, as to Parker's good faith and all other pertinent issues, there is no occasion to disturb the verdict on defendants' appeal. (6 Witkin, California Procedure [2d ed. 1971] Appeal, § 245, pp. 4236-4238.)

Evidentiary Rulings By The Trial Court

Defendants claim two errors in this regard, with the asserted result that plaintiffs were given "a near monopoly" of evidence upon the significant issue of the value of the Alameda County land in 1968. The first claim pertains to that portion of the prayer, in the complaint, where plaintiffs referred to the prospect of a deficiency judgment. (See fn. 3, *ante*.) Upon their motion at the commencement of the jury trial, the court made an order prohibiting any evidentiary reference to this subject. Defendants claim error upon the basis that such reference was admissible because the passage amounted to a "judicial admission," by plaintiffs, that the Alameda County land was not—as defendants contended it was not—worth $200,000 in 1968.

As plaintiffs point out, however, the passage was necessarily included in the prayer to entitle them to all per-

missible aspects of the judicial foreclosure and sale sought by them, including the contingency of a money deficiency after the sale. Viewed as a *pro forma* element of the prayer alone, it was not a "judicial admission" in the sense for which defendants contend. (See Witkin, California Evidence [2d ed. 1966] § 501, p. 472.) In any event, its probative value was outweighed by its potential for prejudice. (See Evid. Code. § 352.) The ruling *in limine* was proper.

Defendants' second evidentiary point is addressed to the trial court's ruling that John Regan was not qualified to testify as an expert on the same subject. This argument expresses the view that his testimony on *voir dire* established his qualifications. Plaintiffs argue to the contrary from certain features of that testimony.

Regan's qualifications to testify as an expert were to be determined by the trial court. (Evid. Code. § 405, subd. (a).) The court's determination rested in its discretion, the exercise of which involved statutory standards of expertise (*id.*, § 720) and is not to be disturbed on appeal unless an abuse of discretion is shown. (*Naples Restaurant, Inc.* v. *Coberly Ford* [1968] 259 Cal.App.2d 881, 883.) None has been demonstrated here.

Jury Misconduct

In support of their motion for new trial on the ground of misconduct by the jury, defendants filed affidavits by two jurors. This action prompted plaintiffs to collect and file affidavits by other jurors, and to take the depositions of some of them, while the motion was pending. Defendants' affidavits tended to establish that one of the jurors had looked up a dictionary definition of the term "promissory note," and had communicated some of her consequent impressions to other jurors, while they were deliberating.

The affidavits filed by both sides raised issues as to the credibility of the various affiants, what the one juror had actually done, and whether her actions had affected the verdict. These issues were to be resolved by the trial court. The affidavits contain substantial evidence in support of the court's implied finding that no prejudicial jury misconduct had occurred. There is no merit to defendants' subsidiary contention that one of plaintiffs' attorneys committed prejudicial misconduct by using certain language in a letter he wrote to some of the jurors relative to their depositions being taken.

Plaintiffs' Cross-Appeal

The points raised on plaintiffs' appeal from the judgment, as reiterated or clarified in their petition for rehearing, may be resolved as follows:

The Amounts Found Due

Plaintiffs contend that the trial court erred in its computation of the principal and interest due them under the Russell note as offset by the amount of the Parker note (see fn. 4, *ante*), and in calculating the award of attorneys' fees from the total. At a hearing where the first computation was discussed, the court explained it as follows:

"In resolving findings of fact and conclusions of law the question has arisen as to the finding of the Court of the amount of judgment $52,947.12. The Court bases this finding on the fact of a payment $15,000 by the defendants to the plaintiff on June 17, 1969. There was at that time due on the [Russell] promissory note as introduced in evidence the sum of $2,438 interest from the date of the note to June 17, 1969.

"In view of the relation of the parties, the Court considers the $15,000 advanced to plaintiff [Parker] as constituting *a new obligation between the parties*, the principal sum of $27,000 to bear interest under the same terms and conditions as the original [Russell] note introduced into evidence. The Court further found that the interest on that principal sum as concluded by the Court from June 17, 1969 to March 21, 1975 was in the sum of $10,279.84; this sum due by way of interest as of March 21, 1975 being $12,717.84. This sum when added to the new principal sum of $27,000 made a total obligation of principal and interest in the sum of $39,717.84." (Emphasis added.)

We cannot agree with plaintiffs' statement that the court's reference to the $15,000 "payment" as "constituting a new obligation between the parties" was "quixotic and unexplained." To the contrary, it shows that the computation of principal and interest was correctly based upon the theory that a *novation* was reached on June 17, 1969. (See 1 Witkin, Summary of California Law [8th ed. 1973] Contracts, §§ 712-713, pp. 598-599.)

As has now been made apparent to this court, however, the trial judge made certain arithmetical errors in applying the theory. None of the parties is blameless in this regard, and the petitions for rehearing reflect their agreement that the errors were made in fact. The interests of justice accordingly require that the judgment be modified to show the correct figures, which we have calculated as follows:

Principal, as reduced from the original $42,000 on June 17, 1969	$ 27,000.00
Interest accrued on the $42,000, and not paid, as of June 17, 1969.....	2,438.00
Interest accrued on the $27,000, at the original rate, from June 17, 1969, to March 21, 1975 (five years and 277 days)	12,439.01
Total (principal and interest)	$ 41,877.01[5]
Attorneys' fees (one-third of $41,877.01	13,959.00
Total (principal, interest and attorneys' fees).....	$ 55,836.01.

The Award Of Attorneys' Fees Upon A One-Third Basis

Plaintiffs also challenge the trial court's actions in fixing the amount of the attorneys' fees at one-third of the total of

[5] Except for the $2,438 included in it as shown, this total has been reached by the calculations employed in defendants' reply to plaintiffs' petition for rehearing. Various arithmetical differences between the parties are of *de minimis* proportions.

principal and interest. The Russell note provided for an award of attorneys' fees in "such sum as the court may fix." The record does not support plaintiffs' assertion that defendants "stipulated" to an award of 45% of the total mentioned.[6] The one-third basis used is reasonable, and the result is not to be disturbed except for the arithmetical modification which is required as shown above.

Juror Deposition Expense

Plaintiffs contend that the trial court erred in striking from their cost bill an item of $972 which they had claimed as the expense of taking the jurors' depositions, in connection with defendants' motion for a new trial upon the ground of jury misconduct, as mentioned above. The Supreme Court has recently held that a motion for new trial upon this ground may be "presented solely by affidavit." (*Linhart* v. *Nelson* [1976] 18 Cal.3d 641, 645 [emphasis added].) The court's reasoning compels the conclusion that such motion may be *opposed* "solely by affidavit." (See *id.*, at pp. 644-645.) It follows that plaintiffs were properly denied recovery of the expense incurred in opposing defendants' motion with depositions. No modification of the judgment is required with respect to the costs awarded.

Attorneys' Fees On Appeal

As plaintiffs have now made clear, they also seek an

[6] On the day the appeals were orally argued before this court, and in open court when they were actually called for argument, plaintiffs filed a written motion for augmentation of the record to include two passages (quoted in the motion) of remarks made by counsel below. Plaintiffs asserted in the motion that the passages support their contention that defendants' attorney "stipulated" as here refuted in the text. The motion was deemed "lodged" because of its late filing, but defendants have since presented written opposition and it remains pending. Having accordingly deemed it "filed" and examined it, we conclude that the quoted passages do not show that anyone "stipulated" as claimed. We also observe that the motion was made without advance notice to defendants' counsel, at the very last moment preceding submission of plaintiffs' cross-appeal, and almost two full months after the filing of the closing brief in which defendants had urged that the record did *not* show that they had "stipulated" as claimed. For any or all of these reasons, the motion for augmentation is to be denied as hereinafter ordered.

award of attorneys' fees on appeal.[7] We conclude that they are entitled to the award by reason of the pertinent provision of the Russell note and the determinations expressed above as to defendants' appeal at least (Civ. Code, § 1717; *Babcock* v. *Omansky* [1973] 31 Cal. App.3d 625, 634); that we may properly defer to the trial court for the purpose of making the award (*Babcock* v. *Omansky, supra*); and that our remittitur should vest that court with appropriate jurisdiction as hereinafter ordered.[8] (See *T.E.D. Bearing Co.* v. *Walter E. Heller & Co.* [1974] 38 Cal. App.3d 59, 65.)

* * * * *

Under all the circumstances presented on the two appeals, we adhere to our initial determination that no party should recover costs on appeal.

Respondents' and cross-appellants' motion for augmentation of the record is denied. The judgment is modified, on page 2 thereof, by striking "$39,717.84" from line 22 and inserting "$41,877.01" in lieu thereof; by striking "$13,239.28" from line 27 and inserting "$13,959.00" in lieu thereof; and by striking "$53,898.42" from line 28 and inserting "$55,836.01" in lieu thereof. As so modified, the judgment is affirmed. The remittitur will vest the trial court with jurisdiction to fix and award

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[7] Their initial request was buried, without citation of authority, in the last two lines of the lengthy brief they filed as respondents and cross-appellants.

[8] Although we have referred to plaintiffs' entitlement to attorneys' fees "as to defendants' appeal at least," we do not so limit the jurisdiction vested in the trial court. We nevertheless observe, for that court's information, that the only result achieved on the cross-appeal, and by plaintiffs' petition for rehearing, was an arithmetical modification of the judgment, the necessity of which might have been avoided before the judgment was entered. With that and other factors in mind, this court is not impressed with the services rendered by plaintiffs' attorneys on the cross-appeal. (See, e.g., fn. 6, *ante*.)

attorneys' fees on appeal to respondents and cross-appellants. No party shall recover costs on appeal.

Rattigan, J.

We concur:

Caldecott, P.J.

Christian, J.

1 Civil 38548

APPENDIX "B"

MODIFIED OPINION OF NOVEMBER 22, 1977

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
IN AND FOR THE
FIRST APPELLATE DISTRICT, DIVISION FOUR

CORTLANDT PARKER, et al.,
Plaintiffs, Respondents and Appellants,

vs.

WENDELL H. RUSSELL, et al.,
Defendants, Appellants and Respondents.

No. 38548
(Sup. Ct. No. 442108)

BY THE COURT:

The opinion filed herein on October 25, 1977, is modified by striking " '$55,836.01' " from line 9 on page 14 and inserting in lieu thereof " '$56,777.31.' "

The petition for rehearing is denied.

Dated: November 22, 1977 CALDECOTT, P.J.

APPENDIX "C"

DENIAL OF HEARING, FEBRUARY 9, 1978

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. *No.* 38548

CORTLANDT PARKER, et al.,
vs.
WENDELL H. RUSSELL, et al.,

Respectfully,

G.E. BISHEL
Clerk

55322-877 10-77 3M OSP

APPENDIX "D"

NOTICE OF APPEAL

LEONARD C. HOAR, JR., 040854
Attorney At Law
5750 N. Palm
Fresno, California 93704
Telephone (209) 439-5503

Attorney for Defendants, Appellants,
and Petitioners RUSSELL

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CORTLANDT PARKER, and
LA VERNE STAMPFLI,

Plaintiffs and Respondents,

vs.

WENDELL H. RUSSELL, LORNA E. RUSSELL, RUSSELL'N PINES MOTEL, a partnership, and TAHOE TITLE GUARANTY COMPANY, a corporation,

Defendants, Appellants and Respondents.

No. 1 Civ. 38548

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that WENDELL H. RUSSELL, LORNA E. RUSSELL and RUSSELL'N PINES MOTEL, a partnership, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California dated November 22, 1977, which became final when the Supreme Court of the State of California Denied Hearing on February 9, 1978.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraphs 1 and 2.

Dated: March 25, 1978

LEONARD C. HOAR, JR.
Attorney for Appellants RUSSELL

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C.C.P.)
STATE OF CALIFORNIA, COUNTY OF FRESNO

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 5750 N. Palm, Fresno, California.

On March 25, 1978, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the Attorney for Respondent and Court of Appeal, First District, Supreme Court of the United States in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

Malcolm Misuraca
Misuraca & Byeres
Attorneys at Law
Post Office Box 878
Santa Rosa, California 95402

Mr. D. R. Robinson
Robinson & Robinson
Attorneys at Law
P.O. Box 511
Auburn, California 95603

Clerk, Court of Appeal, First District
4154 State Building
San Francisco, California 94612

Mr. Michael J. Rodak
Clerk
Supreme Court of the United States
U.S. Supreme Court Building
Washington, D.C. 20543

Executed on March 25, 1978 at Fresno, California

I declare; under penalty of perjury, that the foregoing is true and correct.

Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C.C.P.)
STATE OF CALIFORNIA, COUNTY OF FRESNO
I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 5750 N. Palm, Fresno, California.
On May 9, 1978, I served the within JURISDICTIONAL STATEMENT on the Attorney for Appellee (3 copies), Attorney for Co-Defendant (3 copies), Court of Appeal (4 copies), Trial Judge (3 copies) and Supreme Court (45 copies) in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

Malcolm Misuraca
Misuraca & Byeres
Attorneys at Law
Post Office Box 878
Santa Rosa, California 95402

Mr. D. R. Robinson
Robinson & Robinson
Attorneys at Law
P.O. Box 511
Auburn, California 95603

Clerk, Court of Appeal, First District
4154 State Building
San Francisco, California 94612

Honorable William J. Hayes
Judge of the Superior Court, Dept. 15
1225 Fallon Street
Oakland, California 94612

Mr. Michael J. Rodak
Clerk
Supreme Court of the United States
U.S. Supreme Court Building
Washington, D.C. 20543

Executed on May 9, 1978, at Fresno, California
I declare; under penalty of perjury, that the foregoing is true and correct.

Signature